No. 11,034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. N. McDONALD,
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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NATURE OF THIS APPEAL.

A. N. McDonald seeks review and reversal of a judgment of the District Court for the Northern District of California, Hon. Louis E. Goodman, Judge, in a combined equity and common law suit for injunction and damages brought by appellee under the powers conferred by the Emergency Price Control Act. The matter on the law side was tried before Court and jury and resulted in a verdict against Mr. McDonald in the sum of $4,634.07. On this verdict judgment was entered and on the same evidence an injunction was granted the Administrator. Motions for new trial and for judgment *non obstante* were denied and the appeal brings the case here.

JURISDICTION.

No question of jurisdiction was, or could be involved, because the Emergency Price Control Act of 1942, Public Law 421—77th Congress expressly confers jurisdiction by subsection c of Section 205 thereof.

STATEMENT OF THE CASE.

A. N. McDonald was engaged in the sale of meats in the city of Oakland. His business was a fairly large one as to volume in normal times, employing seven and eight persons. (Trans. 67.) It consisted in supplying meat to restaurants, boarding houses and the like. There was a small retail business in the store but this did less than 15 per cent of the total. (Trans. 16.) It was, however, as to management, a one-man business.

In May, 1942, Mr. McDonald fell sick and his doctor advised him to get a rest. He accordingly left San Francisco on May 18th to go to Montreal, his former home. At the time of leaving he expected to be gone about two or three weeks. However, at Montreal, a serious illness supervened and he did not return until the 19th of July. (Trans. 66.)

All the alleged violations of the price control act involved in this suit took place during that time. (Pltf's Exhibit 1, Trans. 95.)

When Mr. McDonald left he had a man in the wholesale department; Mr. Finke, a trusted employee with whom he had contemplated partnership, though that

deal had fallen through; and one man in the retail side of the store. Mrs. McDonald, in the emergency, took charge of the store. She had no knowledge of meats and grading. During Mr. McDonald's absence two men were drafted and the substitute for one proved to be so given to "celebrating" that he could not be depended on. (Trans. 67.)

In addition to her duties at the store, Mrs. McDonald had to do all the housework at her home. She has two daughters, one aged ten, and one sixteen, the latter unable by reason of illness to aid in the work at home. (Trans. 68.)

During her time of running the business Mr. Finke worked as much as eighteen and twenty hours a day, trying to get out the orders. Mrs. McDonald did billing and bookkeeping and also helped to put up orders. (Trans. 71.)

A printed list was posted in the place when Mr. McDonald left, giving the prices for various grades. The O. P. A. authorities came in there and made no complaint. (Trans. 72.) Mrs. McDonald followed the prices on this list. The record does not show whether this list was furnished by the Office of Price Administration or by the Butcher's Association but Mr. McDonald told his wife to follow that list and she tried her best to do so. Her own sales were graded by Mr. Finke as she had herself no knowledge of grades. (Trans. 71.)

At some undetermined time, officers of the appellee secured from the bookkeeper of Mr. McDonald all

the *sales slips* for the month of June, 1943. (Trans. 34.) From this a transcription in lead pencil was made and this transcription appears in evidence as Exhibit 1. (Trans. 95.)

By a pre-trial order, this document was handed to counsel for appellant, who was ruled as follows:

> "3. That plaintiff deliver to defendant or his counsel for critical examination the transcript prepared by investigators of the Office of Price Administration from the invoices and records of said defendant A. N. McDonald for the period of June 1, 1943, to July 3, 1943 inclusive, which transcript shows not only the facts appearing upon the face of said invoices but also a listing of the proper ceiling price applicable to each sale and the determination of the overcharge alleged with reference to each sale. That defendant, after such critical examination of said transcript, indicate in writing to plaintiff by specifications of objection the particulars wherein he claims that such transcript does not state the true facts applying to each sale, or the proper maximum price at which each sale exceeds the maximum lawful price which defendant could have charged in making such sale. That if no objection be made or specifications of objection be furnished by defendant as hereinabove permitted, it be considered by this Court for the purposes of this action that each item set forth in said transcript is true, accurate and correct as to the description of said item sold, the price charged, the applicable lawful maximum price, and the amount of overcharge, if any. That if objection be made and specifications of objection be furnished by defendant, and not be reconciled by

agreement between the parties hereto, the issues so joined by such objection and specifications of objection be tendered for determination at the trial of said action.

4. That issues in said action be limited as hereinabove set forth and as so limited that this Pre-Trial Order and the objections and specifications of objection as permitted hereunder be considered a complete statement of all matters in dispute between the parties to this action. That this Pre-Trial Order shall not be amended except with the consent of the parties or at the discretion of the Court to prevent manifest injustice in accordance with Rule 16 of the Federal Rules of Civil Procedure."

At the trial, this penciled document was offered and received in evidence as Exhibit No. 1 over defendant's objection. The defendant, through his counsel, refused to review the document and offer any criticism of the items thereof.

Except for this document, supported by testimony of agents of the Administrator that it was a transcript of a *copy* of sales records received from the bookkeeper of McDonald & Finke, there was virtually no evidence on the part of the plaintiff.

(One witness testified that he followed grades through several sales, but those sales were trivial in amount and no pretense was made that more than a fraction of grades were thus checked.)

There was no proof, other than this transcript of a *copy* of sales slips (Trans. 35) that any meat had been

delivered under the original sales invoices; that anyone had agreed to pay the prices shown on such invoices for the merchandise covered thereby; that any of the persons listed were buying for re-sale or for other than their own use and consumption; that any of the supposed purchasers had ever paid anything under the items shown by the supposed transcript of the *copy* of the sales invoices.

At the close of the plaintiff's evidence and again at the close of the entire evidence, the defendant moved for a directed verdict, calling the Court's attention specifically to the above lack of evidence. (Trans. 59, 75.) Each motion was denied. Motion for judgment notwithstanding the verdict was denied. (Trans. 18.)

Defendant preserved exceptions to the judge's charge to the jury as a whole and to the court's failure to charge the jury that the presumption of innocence applied and that the presumption of honesty and fair dealing applied in favor of the defendant; and also preserved exceptions to the statement of the Court's opinion that overcharge in the sum of $4134.07 was proved by Exhibit 1; that the defendant's refusal to point out discrepancies in Exhibit 1 indicated an admission on his part that any particular person therein listed was himself unable to have brought action for overcharge; and also to the portions of the charge which made it the absolute duty of the defendant to conduct his business in accordance with price regulations; and that part of the charge which told the jury that, as far as the Chand-

ler defense was concerned, the defendant was bound by the acts of his agents. (Trans. 89, 90, 91, 92.)

The verdict of the jury was in favor of the Administrator in the sum of $4634.07. (Trans. 18.) Judgment followed the overruling of defendant's motions for judgment n. o. v. and for a new trial. (Trans. 19.)

On the same evidence and no other, an injunction was granted the Administrator. (Trans. 24.) The findings merely were to the effect that everything alleged in the complaint except in paragraphs 2, 3 and 4 of count 6 was true. (Trans. 21.)

SPECIFICATION OF ERRORS.

1. The Court erred in requiring the defendant, by pre-trial order, to be deemed to admit all that he did not specify by way of objection to the document afterwards received in evidence as Exhibit 1.

2. The Court erred in admitting Exhibit 1 in evidence, said document being a supposed transcript of a *copy* of sales slips, or invoices, and there being no showing as to who made the copy, furnished by an employee of McDonald & Finke, and in overruling the defendant's objections made to such admission, the same being as follows: (Trans. 36)

> "Mr. Brunner. I offer now, if your Honor please, the transcript, which is marked Plaintiff's Exhibit 1 for identification, in evidence.
>
> Mr. Reagh. In this matter, your Honor, as to the portion of the document regarding the ceiling price I take it that is already covered by your

Honor's ruling, and I renew my objection to that. As to the transcript of the transaction involved, I object on behalf of the defendant as immaterial, irrelevant, and incompetent, not the best evidence, no proper foundation having been laid, calling for an opinion and conclusion of the witness on the precise matter in controversy, and as to the duty of the defendant in the pre-trial order to have studied and set forth any discrepancies, I object on the ground that the pre-trial order calls upon the defendant to violate his privilege under the bill of rights, in that the matters and things charged in the complaint could have been made and now are the subject of a criminal prosecution under section 4. I further object on the ground that the defendant was called upon to expose himself to penal punishment by the demand made upon him, under penalty of having made an admission in pointing out anything in this transcript to which he objected. It is improper practice to demand of defendant under penalty of being guilty of an admission that he pointed out particular items and be deemed to have admitted all of the rest——

The Court. I do not want to interrupt you, but you are arguing the matter.

Mr. Reagh. I am trying to save time, I am trying to state my grounds of objection only.

The Court. I do not understand that this transcript is being offered as an admission. Unless I am incorrect the witness testified that this is a correct copy of the records that were furnished him by the defendant. The witness' testimony is that it is correct as to the ceiling prices from the data which was assembled from the record of the defendant. Is that correct?

A. Yes.

The Court. Is there anything you wish to add to your objection?

Mr. Reagh. If your Honor please, I have sufficiently stated my grounds of objection; that is all.

The Court. That is up to you. You can state any grounds you wish.

Mr. Reagh. The defendant through his counsel specifically sets up a claim to immunity under the Bill of Rights for being required to furnish testimony against himself, and under the necessity at pre-trial conference of indicating objections or being deemed to admit all else contained in it.

The Court. Inasmuch as there is no question of procedure involved I do not think that there is anything to the objection. It is overruled. The exhibit may be admitted in evidence.

(Plaintiff's Exhibit 1 for Identification was thereupon admitted in evidence.)

3. It was error to overrule appellant's motion for a directed verdict and his subsequent motion for judgment notwithstanding the verdict.

4. The Court erred in refusing to charge the jury that the presumption of innocence applied to the defendant and also in failing to charge the jury that the law presumes honesty and fair dealing in transactions. There was nothing at all in connection with this matter in the charge and specific exceptions were preserved. (Trans. 91.)

5. The Court erred in charging the jury as to the so-called Chandler defense. The entire charge of the Court on the subject was (Trans. 84):

> "Now, at the present time under the law it is the opinion of the court, and I so instruct you, that so far as any damages are concerned in excess of actual overcharges, if the defendant had not proved to you by a preponderance of the evidence that the violations of the Price regulations were neither wilful nor the result of failure to take practicable precautions against the occurrence of violations, you have the discretion of determining how much damages may be awarded over and above the actual overcharges, but not to exceed three times the amount of such overcharges."
>
> * * * * * * *
>
> (Trans. 86.)
>
> "Now, I have already called your attention, Ladies and Gentlemen of the Jury, to a special defense which the defendant has urged. The defendant, by his counsel, has argued to you that the evidence in this case shows that you should not award damages above the overcharges, because the evidence shows, as contended by the defendant, that the defendant did not act wilfully nor did the violations result from a failure to take practicable precautions against the occurrence of the violations.
>
> I wish to advise you that the term 'wilful' as used in the statute means purposely or obstinately. It is designed to describe the attitude of a person who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to the requirements.

'Practicable precautions' as used in the statute are those precautions that would be adopted and safeguards that would be maintained by a reasonably prudent business man under all of the circumstances to prevent and guard against his violating price regulations or schedules applying to his business.

An employer or a principal who entrusts the conduct of his business of part of his business to employees or agents is, under general principles of law, bound by the acts of the employees in the regular scope of the employment.

It is for you to determine under the facts and circumstances in this case whether or not the defendant has proved by a preponderance of the evidence that the defendant's violations of the price schedules, if you find that there were such violations, were not wilful and not the result of failure to take practicable precautions to prevent and guard against the occurrence of violations.

It is defendant's duty to inform himself of price regulations and schedules issued by the Price Administrator affecting his business, and it is his duty to conduct his business in such a manner as to prevent violations of such regulations.

Now, Ladies and Gentlemen of the Jury, I think that is a fair and proper statement of the law applicable to this particular charge."

(a) Such charge erred in telling the jury that it was the absolute "duty (of the defendant) to inform himself of price regulations and schedules issued by the Price Administrator and * * * to conduct his

business in such a manner as to prevent violations of such regulations".

(b) Such charge erroneously stated that the defendant was "under general principles of law, bound by the acts of his employees in the regular scope of the employment".

6. The Court erred in instructing the jury that in the Court's opinion, Exhibit No. 1, "plus the testimony of the witnesses produced by plaintiff, establishing (sic establishes), the fact that overcharges in the total sum of $4134.70 were made by the defendant". (Trans. 85.) Defendant specifically excepted to this. (Trans. 91.)

7. There was no evidence to warrant an injunction and none should have been granted the Administrator.

ARGUMENT.

I.

By the pre-trial order, under the guise of limiting the issues, the Court required the defendant to furnish the plaintiff with a bill of particulars, under penalty of having a penalty assessed against him. This was against the objections of the defendant, who noted his exceptions to the order. (Trans. 17.)

(a) Rule 16 of the District Court Rules does not permit such a practice. The precise words under which such a procedure must be justified, if at all, are

> "The court shall make an order which recites the action taken at the conference, * * * the agreements made by the parties as to any of the matters considered, *and which limit the issues for trial to those not disposed of by admissions or agreements of counsel.*"

Here there is no pretense that there were any admissions or agreements of counsel—on the contrary, objections and exceptions. No case appears in the digests where any such power has before been claimed.

(b) The adjective features of the Price Control Act are penal, rather than remedial. We are aware that, so far as appears from reference works at this date, no Circuit Court of Appeals has decided this proposition and but one District Court case seems reported.

In *Bowles v. Troubridge,* 60 Fed. Supp. 48, the opinion of Judge St. Sure of this district reviews the law on the subject and reaches the conclusion stated above.

Indeed, if this statute be considered remedial, perhaps some one will have the goodness to give an example of a penal statute. If the statute be a remedial one, how can the provisions concerning costs and attorney's fees be valid. Costs and attorney's fees are, by this act, allowed to the Administrator if he be successful and are denied to the defendant if the action fail. The parties do not start equal. As a penal statute, there can be no objection to such a course. But if remedial, the statute denies the equal protection of the laws.

(c) By the pre-trial order, the defendant was required, in effect, to furnish evidence against the salutary rule of the Constitution forbidding a requirement of self-incrimination.

The rule in question applies not only to criminal cases but also and with equal force to cases wherein the defendant will be exposed to a penalty or forfeiture. (*Boyd v. United States,* 116 U. S. 616-631, 29 Law. Ed. 746.) And see, *U. S. v. White,* 137 Fed. (2d) 34.

(d) The pre-trial order is objectionable for another reason, namely, that it amounts to a prejudgment of the entire case. The Court finds that "the transcript shows not only the facts appearing upon the face of said invoices but also a listing of the proper ceiling price".

II.

Exhibit 1 was a transcript of a *copy,* made by an unknown and unidentified person, of sales invoices, furnished by the bookkeeper of McDonald & Finke to the Administrator's agents. It was offered in evidence and admitted over objection that it was not the best evidence and that no proper foundation for its reception had been made.

There was no showing that any notice to the defendant to produce originals had been made. To authorize secondary evidence, such a showing is requisite (*Myrick v. U. S.,* 219 Fed. 1) unless the originals are

shown to have been lost, mislaid, or the like. (*Burton v. Driggs,* 20 Wall. 125, 22 Law. Ed. 299.)

For this reason alone the exhibit should have been refused admission. Unquestionably an abstract of lengthy books of account, etc, is admissible, but we contend that this is true only when it is shown that the books from which the abstract is made would have been admissible in the first place. There was no showing at all as to who made the original invoices or the copies from which the transcript was made, nor as to the authority of the bookkeeper of McDonald & Finke to keep the records of defendant, and the evidence showed that at the time of the transactions in question there was no bookkeeper. (Trans. 67.)

We understand that the other objections made to this exhibit have been recently considered by this Court and adversely to our contention. It would be an idle act to reargue them. We do not abandon these contentions nor concede any lack of force to them. The writer merely assumes that extended observations on this subject would burden the Court uselessly.

III

At the close of the plaintiff's evidence and again at the close of all the evidence, the defendant called the attention of the Court to the fact that there was no proof whatever that any of the merchandise covered

by Exhibit 1 had ever been paid for or delivered; that on its face the exhibit purported to be only a transcript of invoices made to accompany deliveries, none marked COD or "Paid" so far as shown. Motion for a directed verdict on this ground was denied.

It was and is the defendant's claim that payment is a pre-requisite to injury; that until an over-charge has eventuated in a payment, no one is injured; that Congress could not have intended to give quadruple damages to a man who had suffered no injury; and that proof of this essential of the cause of action should be made in this class of case the same as in any other.

Of course, mere rescission of a completed transaction would not avoid the penalty. On that everyone must necessarily agree. But until payment has been made there is simply nothing to rescind, absent at least proof that the buyer had agreed on an excessive price, there being no such proof in this case.

By the terms of the Act, the *payment* of receipt of rent is made the selling of a commodity. (Section 205, sub-section e.)

To hold that a mere mis-billing would give rise to a cause of action would stretch the Act beyond any possible sense. A man who had paid nothing would recover one and one-half more than a man who had paid in full. (Suppose the bill called for $2.00 more than the proper price. The man who refused to pay would recover $6.00. The man who had paid would recover $6.00. But the latter would be getting back $2.00 which he never, in contemplation of law, should

have paid. His net gain would be $4.00. This would be truly a marvelous result for a "remedial" law.)

When the attention of the Court was drawn to the condition of Exhibit 1, really the sole evidence in the case on the part of the plaintiff, on the motion for directed verdict, His Honor merely remarked:

> "Why didn't you go into those matters and examine the witness who made the statement" * * * If you had wanted to attack that, you could have cross-examined the witness and developed matters that go to the credibility and weight of this statement."

Well, the exhibit is here and before the Court and we respectfully ask the Court how a verdict and judgment on such a document, with manifest errors, miscalculations, erasures, uncertainties, can be the basis of any computation herein.

The defendant also preserved the point further by an exception to the charge of the Court. (Trans. 90.)

IV.

The defendant was entitled to the presumption of innocence and to the benefit of the presumption of honesty and fair dealing. These presumptions and their benefits were refused the defendant. We contend that this was error. (The presumptions are not identical but we present them under a single specification of error because of their cognate character.)

Cincinnatti R. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 Law. Ed. 1022;

Alexander v. Fidelity Trust Co., 249 Fed. 1;
Drown v. New Amsterdam Cas. Co., 175 Cal. 21, 165 Pac. 5;
Moses v. U. S., 166 U. S. 571, 17 Sup. Ct. 682, 41 Law. Ed. 1119;
Fisher v. McInerney, 137 Cal. 28, 69 Pac. 622.

V.

The charge of the Court concerning the so-called Chandler defense was misleading and unfair to the defendant. Virtually the charge deprived the defendant of the Chandler defense. To lay on a defendant the liability for all acts of his employees and an absolute duty to be informed and to regulate his business at all events to obey the price regulations is to make a mock of the exception which Congress grafted on the law and expressly made applicable to pending litigation.

The mere fact that all that was said was abstractly correct, does not save the error.

Otis v. Pittsburg, etc. Co., 220 Fed. 595;
Cincinnati T. Co. v. Roebusch, 192 Fed. 520.

In a narrow and technical sense, perhaps each item in this charge was correct. Nonetheless, in sum it lays on the defendant an absolute duty to avoid any violation of the price regulations. The Court does not qualify the duty in any way. It is made defendant's duty to inform himself of the price regulations and his duty to conduct his business in such a way as to prevent violations of those regulations.

A defendant lying sick 3000 miles away, unable even to write, with a wife inexperienced in business essaying her best to keep food moving to wartime workers, short-handed, with his only trustworthy employee working to and beyond the limits of human capacity, on him is placed the "duty to inform himself of price regulations" and "conduct his business in such a manner as to prevent violations of such regulations."

As phrased, the charge was ambiguous and unfair. That it exercised an unwarranted influence on the jury is demonstrated by the fact that they found a verdict in excess of the *claimed* overcharges when the evidence supporting the Chandler defense was overwhelming.

We offer specific criticism of that part of the charge quoted just above which told the jury that the defendant was "bound by the acts of the employees in the regular scope of the employment".

The very purpose of the Chandler proviso was to aid a master whose efforts to obey the law had been thwarted by the mistake or failure of an employee. If the rule "respondeat superior" be rigidly enforced, the Chandler defense is gone. How else could "practicable precautions" to obey the law fail than by the default or neglect of an employee or agent?

VI.

The Court expressed to the jury an opinion that Exhibit 1, plus the testimony of the witnesses, "estab-

lishing (establishes) the fact that overcharges in the sum of $4,134.70 were made by the defendant."

This part of the charge could be valid only if there was evidence that an overcharge in some amount had been made and if, on the face of Exhibit 1, the amount of the Court's computation were correct. The Court has the right to express an opinion in instructing the jury but the opinion must not be arbitrary.

The exhibit speaks for itself. We have already argued the question as to whether or not proof of payment was required. If such proof was requisite, this charge was error.

VII.

Even if the evidence had shown a liability of the defendant for damages to the extent of the overcharge, under the circumstances of this case, no injunction was warranted. (The fact that the defendant is no longer in business, the attempt to comply with O. P. A. regulations and to fight the black market practices which those regulations have notoriously fostered having proved too much for him, we consider immaterial because, theoretically at least, he may want to go back into business before O. P. A. goes out.)

The sole violations were demonstrated to have occurred, if at all, while the defendant lay sick at Montreal and the officers of the Administrator knew this. (Trans. 40.) The record shows no charge against the defendant except during that emergency. As soon as

he resumes the charge of his business all criticism ceases. The action was filed August 23, 1943. By a supplemental complaint, any act of the defendant after July 19, 1943, could easily have been brought into the case. Moreover, if such act had been available, evidence thereof would have been admissible to prove intent and the necessity for an injunction. There was no such supplemental complaint and no such evidence.

We submit that the discretion of the court was abused in this case.

CONCLUSION.

The circumstances of this case smack far too much of oppression to justify any very narrow view of the law. The defendant certainly should be held bound to obey the law but there was no reason to stretch matters to the extent of depriving him of any legal right on the theory that a guilty man has no rights anyway. If guilty, his guilt was but a technical one. And a man accused of only a technical violation of law has the right to strict technical rules when he is being tried on such a case. He must be mulcted under all the forms of law.

We respectfully submit that the case should be sent down for a new trial.

Dated, San Francisco,
September 7, 1945.

CHARLES REAGH,
Attorney for Appellant.